82-266

No.

Office - Supreme Court, U.S.
FILED
AUG 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MICHELIN TIRE CORPORATION and LA MANUFACTURE FRANCAISE DES PNEUMATIQUES MICHELIN,
Petitioners,

v.

MAUDELL H. FALLAW; FLETCHER L. FALLAW; SOUTHEASTERN FREIGHT LINES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals below correctly hold that jury nondisclosure of material information when properly questioned during voir dire examination is not a valid ground for the granting of a new trial unless such nondisclosure is deliberate or intentional?

LISTING PURSUANT TO SUPREME COURT RULE 28.1

Michelin Tire Corporation is a New York corporation. Its parent companies are the Michelin Corporation, the Michelin Investment Holding Company, Compagnie Financiere Michelin and Compagnie Generale des Etablissements Michelin. It has no subsidiaries or affiliates.

La Manufacture Francaise Des Pneumatiques Michelin is a French company. Its parent company is Compagnie Generale des Etablissements Michelin. Other than wholly owned subsidiaries, it has an indirect partial holding in Kleber Colombes, another French tire company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

MICHELIN TIRE CORPORATION and LA MANUFACTURE FRANCAISE DES PNEUMATIQUES MICHELIN,
Petitioners,

v.

MAUDELL H. FALLAW; FLETCHER L. FALLAW; SOUTHEASTERN FREIGHT LINES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

GROUNDS FOR INVOKING JURISDICTION OF COURT

The opinion below is dated May 20, 1982. No petition for rehearing was filed. The judgments of the United States Court of Appeals for the Fourth Circuit are also dated May 20, 1982. Jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. The United States District Court for South Carolina wrote no opinion but made oral pronouncements in denying Petitioners' motion for new trial. Both the unpublished opinion and the oral pronouncements are reproduced in the Appendix.

STATEMENT OF THE CASE

This litigation arises out of a collision between a tractor-trailer rig and a tanker rig. The tractor-trailer was equipped with Michelin tires. Respondents sued Petitioners, as manufacturers of the tires, alleging the collision was caused by a defective tire. Suits seeking recovery for personal injury and property damages were filed in the United States District Court for South Carolina, federal jurisdiction being based on diversity of citizenship. A prior appeal involving discovery of trade secrets was mooted by a stipulation of the parties which was recognized by the United States Court of Appeals for the Fourth Circuit. Under this stipulation the determinative question as to liability was whether the tire blew out without being punctured by an external object or whether the blowout resulted from the penetration of an external object.

When the jury was being selected to try the cause, the entire venire was asked by the trial judge:

> Have any of you ever been a Plaintiff or a Defendant in an action brought for damages?
>
> Has anyone ever sued you or have you ever sued anybody for money as a result of damages or injuries you or that other person allegedly sustained? If so, please stand.

Mrs. Polk made no response to either question, was selected as a juror by the parties, and was later appointed foreperson of the jury by the trial judge.

The trial judge also asked the prospective jurors:

> Have any of you or members of your immediate family, close friends or business associates ever operated or been a passenger in a vehicle when a tire

> blew out? If so, please stand and explain the circumstances.

Neither Mrs. Pennington nor Mrs. Carrigg made any response to the question. Both were selected jurors.

Thereafter, on conflicting evidence, the jury found Petitioners liable and awarded Respondents damages totaling $1,370,500.00.

In post trial proceedings, it was first learned that three of the six jurors had failed to disclose material information during voir dire examination. Mrs. Polk, the foreperson, failed to disclose that she had settled a personal injury case before trial and had another personal injury claim pending at the time of trial. In addition, Mrs. Pennington and Mrs. Carrigg had prior tire blowout experiences that they did not reveal.

The District Court denied Petitioners' motion for new trial on the ground of juror nondisclosure, finding that such nondisclosure was not intentional.[1] The Court of Appeals affirmed, holding:

> With respect to all three jurors, the district court found the absence of any intention to withhold information, and we accept that finding as not clearly erroneous. Had there been deliberate untruthfulness, at least when compounded by possible bias, defendants would have been entitled to a new trial. *See United States* v. *Bynum*, 634 F.2d 768, 771 (4 Cir. 1980); *McCoy* v. *Golstein*, (sic) 652 F.2d 654, 658 (6 cir. 1981). But, here, where the nondisclosure was

---

[1] The District Court "found" in oral pronouncements from the bench that Mrs. Polk did not hear the questions; that Mrs. Pennington did not remember her prior blowout; and that Mrs. Carrigg did not regard her prior experience as a "blowout" when she ran her truck into a curb to avoid an accident and had a blowout.

> not deliberate, the only inquiry is whether the juror's post-verdict responses disclosed actual bias or prejudice as a matter of law. *See United States* v. *Vargas*, 606 F.2d 341, 344 (1 Cir. 1979); *United States* v. *Mulligan*, 573 F.2d 775, 777 (2 Cir.), *cert. denied*, 439 U.S. 827 (1978). We think that these jurors' answers did not satisfy this test. . . .

This petition for writ of certiorari seeks to question the correctness of the above holding and the wisdom of adopting such a rule in the federal courts.

REASONS FOR GRANTING THE WRIT

Petitioners urge the Court to grant this petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit for the following reasons:

1. The Fourth Circuit Court of Appeals below has rendered a decision in conflict with decisions of other federal courts of appeal. While the rule in some circuits is, as held below, that juror nondisclosure must be intentional to warrant a new trial, other circuits hold that a new trial must be granted if the nondisclosure results in substantial impairment of the right to exercise peremptory challenges intelligently.

In *Photostat Corporation* v. *Ball*, 338 F.2d 783 (10th Cir. 1964), certain jurors failed to disclose prior personal injury claims on voir dire. The trial court, however, denied a new trial on the ground that the nondisclosure was not intentional and defendant received a fair trial. On appeal, the Tenth Circuit reversed, stating:

> . . . It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise

> his right of peremptory challenge. If so, the suppression was a prejudicial impairment of his right.
>
> None of the jurors in our case or any of their immediate family were or had been plaintiffs in a pending suit. On the record, their involvement in automobile accidents with resultant claims were inadvertently withheld due to a misunderstanding of the questions on voir dire. But the information was withheld through no fault of the unsuccessful litigant. But it did involve experiences of these jurors which gave rise to claims for damages for which they were paid. When these experiences are considered separately or in totality, we think they were of such nature and gravity as to generate an attitude of probable bias in favor of the plaintiff and against the defendant's cause. In any event, we have no doubt that counsel was entitled to know about them.
>
> The case is accordingly reversed with directions to grant a new trial. (338 F.2d at 787).

To like effect is the Tenth Circuit's earlier opinion in *Consolidated Gas & Equipment Co. of America* v. *Carver*, 257 F.2d 111, 115 (10th Cir. 1958):

> . . . Whether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency. And such deception and misleading had the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right . . .

The rule in the Sixth Circuit is a dual test, adopting both the Fourth Circuit "deliberate concealment" rule and the Eighth Circuit's "substantial impairment of voir dire examination" rule. In *McCoy* v. *Goldston*, 652 F.2d 654, 658-659 (6th Cir. 1981), the Sixth Circuit held:

> First, deliberate concealment or purposefully incorrect responses during *voir dire* suffice to show a

prejudicial impairment of the right to the exercise of peremptory challenges. A district court should consider the following factors to determine if a juror has intentionally concealed or purposefully given incorrect answers:

A. Whether the question asked sufficiently inquired into the subject matter to be disclosed by the juror.

B. Whether the response of other jurors to the question asked would put a reasonable person on notice that an answer was required.

C. Whether at any time during the trial the juror became aware of his false or misleading answer and failed to notify the district court.

Second, a prejudicial impairment of the right to the exercise of peremptory challenges also is established if the undisclosed information is indicative of probable bias concerning either a material aspect of the litigation or its outcome.

In *Vezina* v. *Theriot Marine Serv., Inc.*, 554 F.2d 654, 656 (5th Cir. 1977), the Fifth Circuit rejected the Eighth Circuit's rule and refused to adopt any hard and fast rule, saying:

> Appellant cites *Photostat Corporation* v. *Ball*, 10 Cir., 1964, 338 F.2d 783 and *Consolidated Gas & Equipment Co. of America* v. *Carver*, 10 Cir., 1958, 257 F.2d 111, where the Tenth Circuit remanded for a new trial cases in which jurors withheld information on voir dire relative to their prior involvement as parties in personal injury cases. The court held that because of the "cogency and significance" of the suppressed information, the unsuccessful litigant's right of peremptory challenge was prejudicially impaired. *See Photostat, supra*, 338 F.2d at 787.
>
> In this Circuit there is no hard and fast rule requiring a new trial for failure of a juror at voir dire examination to disclose in a personal injury case the fact that

he was a party in a similar case. In the absence of a showing of prejudice to a litigant the mere failure of a jury to make such a disclosure is not ground for a new trial. *Atlas Roofing Manufacturing Company* v. *Parnell*, 5 Cir., 1969, 409 F.2d 1191. The determination of whether a new trial should be granted because of jury misconduct is left to the sound discretion of the trial court and must be decided on an *ad hoc* basis. *See Garcia* v. *Murphy Pacific Marine Salvaging Company*, 5 Cir., 1973, 476 F.2d 303; *Lowe* v. *O'Meara*, 5 Cir., 1973, 482 F.2d 1373.

The federal system, at present, lacks a uniform rule regarding the effect of juror nondisclosure of material information during voir dire. This Court alone can establish such uniformity.

2. The holding below does not accord with the applicable decisions of this Court. The peremptory challenge is regarded as "a necessary part of trial by jury" and "denial or impairment of the right is reversible error without a showing of prejudice." *Swain* v. *Alabama*, 380 U.S. 202, 219 (1965). When material information is not disclosed by prospective jurors the right to exercise peremptory challenges is impaired even if such nondisclosure is caused by impaired hearing or memory rather than a juror's intent to deceive.

3. The quest for justice in the federal system is not well served by the lack of uniformity which now exists. The effect of a federal juror's nondisclosure during voir dire should be the same no matter where it occurs.

CONCLUSION

Petitioners respectfully submit that the petition should be granted.

Respectfully submitted,

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BY _____
John M. Kenney

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1812

MAUDELL H. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCAISE DES
PNEUMATIQUES MICHELIN,

Appellants.

No. 81-1813

FLETCHER L. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCAISE DES
PNEUMATIQUES MICHELIN,

Appellants.

No. 81-1314

SOUTHEASTERN FREIGHT LINES,

Appellee,

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCASIE DES
PNEUMATIQUES MICHELIN,

Appellants.

Appeals from the United States District Court for the District of South Carolina, at Charleston. C. Weston Houck, District Judge.

Argued February 2, 1982 Decided May 20, 1982

Before WINTER, Chief Judge, BRYAN, Senior Circuit Judge, and PHILLIPS, Circuit Judge.

Sam Daniels (Daniels and Hicks; John M. Kenney, John M. Kenney, P.C.; Joseph R. Young, Young, Clement, Rivers & Tisdale; Wade H. Logan, III, Holmes, Thomson, Logan & Cantrell on brief) for Appellants; Cody W. Smith, Jr. (Solomon, Kahn, Smith & Baumil on brief) for Appellees.

PER CURIAM:

This diversity action for personal injuries arose from a collision between a tractor-trailer unit and a tanker rig, the latter being equipped with tires manufactured by defendants, one of which blew out in the course of the collision. As a result of a stipulation between the parties entered into after a prior appeal, the determinative question as to liability was whether the tire blew out without being penetrated by an external object or whether the blowout resulted from the penetration of an external object.

On conflicting evidence, the jury found that the tire blew out without being penetrated by an external object and it awarded substantial damages to plaintiffs. Defendants appeal contending that the judgment entered on the verdict should be reversed and a new trial awarded because of reversible error in (1) the failure of the juror who was selected as foreman to disclose that as a plaintiff she had settled a personal injury claim and had another pending while she served in the instant case, and the failure of two other jurors to disclose that they had prior experience with tire blowouts, despite interrogation on voir dire about both subjects, and (2) the admission into

evidence of a portion of a written statement of the deceased driver of one of the vehicles taken by an insurance adjustor.

We affirm.

VOIR DIRE

A. Failure To Disclose Personal Injury Claims.

The entire venue was questioned by the district court as follows:

> Have any of you ever been a Plaintiff or a Defendant in an action brought for damages? If so, please stand and give your name.
>
> Has anyone ever sued you or have you ever sued anybody for money as a result of damages or injuries you or that other person allegedly sustained? If so, please stand.

Mrs. Caryl C. Polk, who was appointed foreman of the jury by the district court after all of the evidence was received, did not respond to either question. At a post-verdict hearing, it was shown that she had brought a suit for personal injuries as a result of an automobile accident in 1974, that that case was settled, that she had been involved in an accident in December 1980, and that after retaining counsel that case was also settled after the trial of the instant case. The 1974 accident did not involve the blowout of a tire, nor did Mrs. Polk sustain injuries comparable to those of the plaintiff in the instant case. The details of the 1980 accident were not developed.

Mrs. Polk testified that she was sitting in the back of the courtroom during voir dire and heard neither question about whether she had been sued or sued anyone. She did not communicate the fact of either accident to other jurors, and she also testified that she did not intentionally or deliberately withhold information from the district court.

The district court found that Mrs. Polk did not intentionally or deliberately withhold information and it concluded that defendants were not prejudiced by her service as a juror.

B. Failure To Disclose Blowout Experience.

The venire was also asked:

> Have any of you or members of your immediate family, close friends of business associates ever operated or been a passenger in a vehicle when a tire blew out? If so, please stand and explain the circumstances.

Neither Mrs. Pennington nor Mrs. Carrigg, both of whom served as jurors, responded to this question.

In the post-verdict proceedings, it was established that about ten years before, Mrs. Pennington had been operating a vehicle when a tire blew out. She testified that the incident was so insignificant that she did not recall it during voir dire and she did not recollect it until she was questioned during a lengthy telephone conversation by defendants' lawyers. She also testified that she did not remember the make of the tire involved nor the nature of the problem with the tire. She did not consider the tire defective and she received no injuries. She claimed that she had not knowingly withheld information from the district court.

Mrs. Carrigg, too, had had an experience comparable to a blowout. She had steered her vehicle into a curb to avoid a collision with another vehicle and the impact with the curb caused her tire to blow out. She said that her experience was unlike the evidence that she had heard in the instant case.

The district court found that neither juror had intentionally failed to respond to voir dire. With regard to Mrs. Carrigg, the court expressed doubt as to whether her experience constituted a blowout, and, with regard to Mrs. Pennington, found that she had not recalled her experience during voir dire. Based upon other testimony, the district court found that neither juror had discussed her experience in the jury room and that the experiences of both were dissimilar to what happened in the case at bar.

C. Discussion And Ruling.

With respect to all three jurors, the district court found the absence of any intention to withhold information, and we accept that finding as not clearly erroneous. Had there been deliberate untruthfulness, at least when compounded by possible bias, defendants would have been entitled to a new trial. *See United States* v. *Bynum*, 634 F.2d 768, 771 (4 Cir. 1980); *McCoy* v. *Golstein*, 652 F.2d 654, 658 (6 Cir. 1981). But, here, where the nondisclosure was not deliberate, the only inquiry is whether the jurors' post-verdict responses disclosed actual bias or prejudice as a matter of law. *See United States* v. *Vargas*, 606 F.2d 341, 344 (1 Cir. 1979); *United States* v. *Mulligan*, 573 F.2d 775, 777 (2 Cir.), *cert. denied*, 439 U.S. 827 (1978). We think that these jurors' answers did not satisfy this test. In the case of Mrs. Polk, neither of her accidents was shown to have any similarity to the case she was hearing and neither was shown to have involved a blowout. In as litigious a country as the United States and in as litigious an era as the present, we cannot say as a matter of law that one who has been a litigant is ineligible from that fact alone for jury service in a suit for personal injuries. With regard to Mrs. Carrigg and Mrs. Pennington, the possibility of bias or prejudice is even less. While Mrs. Pennington had had experience with a blowout, the incident was so remote and so insignificant that she did not recall it, or, when her recollection was refreshed, any of its significant details. Mrs. Carrigg's experience, while technically, perhaps, with a blowout, was so dissimilar to the case in which she sat that we cannot conclude that her ability to be an objective juror was adversely affected.

ADMISSIBILITY OF WRITTEN STATEMENT

Mr. Mitchell Barnhill was the operator of the tanker rig which was involved in the collision. Within the period of five to fifteen minutes after the collision, he made several comments about how the accident occurred to other truck drivers who had stopped to give assistance. At trial, they were permitted to testify about what Barnhill had said, apparently under the

excited utterance exception to the rule against hearsay. Rule 803(a), Fed. R. Evid. His statements were to the effect that he heard a loud explosion and thereafter felt an impact to his vehicle.

A week after the accident, Barnhill was interviewed by an insurance adjustor and gave a written, unsworn statement which he signed, page by page. By the time of the trial, Barnhill had died from causes unrelated to the accident, and at trial, a portion of his statement was read to the jury. The statement, in essence, was that the explosion occurred before the impact, a most material fact under the stipulation of the parties as to liability. The district court ruled this portion admissible under Fed. R. Evid. Rules 803(24) (the catchall "other exceptions" exception to the rule against hearsay) and 804(b)(5) (permitting admission of written statements given under certain guarantees of trustworthiness).

We think it debatable whether the statement was admissible under the rules, but it is unnecessary for us to resolve the issue. Even if inadmissible, the portion of the statement admitted was merely cumulative of the excited utterances which were clearly admissible. Any error was therefore harmless.

AFFIRMED.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1812

MAUDELL H. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCAISE DES
PNEUMATIQUES MICHELIN,

Appellants.

FILED
Jun 14 1982
John W. Williams, Clerk
U.S. District Court

Appeal from the United States District Court for the _____ *District of* South Carolina

This cause came on to be heard on the record from the United States District Court for the _____ *District of* South Carolina, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

FILED
May 20 1982
U.S. Court of Appeals
Fourth Circuit

/s/ William K. Slate II
WILLIAM K. SLATE II
Clerk

COSTS—APPELLANTS

Costs of printing appellees' brief	$204.00
Total Costs	$204.00

A True Copy, Teste:
William K. Slate, II, Clerk

/s/ By Linda Y. Dorsey
LINDA Y. DORSEY
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1813

FLETCHER L. FALLAW,

Appellee,

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCAISE DES
PNEUMATIQUES MICHELIN,

Appellants.

FILED
Jun 14 1982
John W. Williams, Clerk
U.S. District Court

Appeal from the United States District Court for the _____ *District of* South Carolina

This cause came on to be heard on the record from the United States District Court for the _____ *District of* South Carolina, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District

Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
WILLIAM K. SLATE II
Clerk

FILED
May 20 1982
U.S. Court of Appeals
Fourth Circuit

A True Copy, Teste:
William K. Slate, II, Clerk

By Linda Y. Dorsey
LINDA Y. DORSEY
Deputy Clerk

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 81-1814

SOUTHEASTERN FREIGHT LINES,

Appellee,

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCASIE DES
PNEUMATIQUES MICHELIN,

Appellants.

FILED
Jun 14 1982
John W. Williams, Clerk
U.S. District Court

Appeal from the United States District Court for the _____ *District of* South Carolina

This cause came on to be heard on the record from the United States District Court for the _____ *District of* South Carolina, *and was argued by counsel.*

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District

Court appealed from, in this cause, be, and the same is hereby, affirmed.

/s/ William K. Slate II
WILLIAM K. SLATE II
Clerk

FILED
May 20 1982
U.S. Court of Appeals
Fourth Circuit

A True Copy, Teste:
William K. Slate, II, Clerk

By Linda Y. Dorsey
LINDA Y. DORSEY
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action File No. 77-1348-2

MAUDELL H. FALLAW

Plaintiff

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCAISE DES
PNEUMATIQUES MICHELIN

Defendants

FILED
Mar 30 1981
MILLER C. FOSTER, JR.,
Clerk
Charleston, S.C.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable C. WESTON HOUCK, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the Plaintiff Maudell H. Fallaw recover of the defendants Michelin Tire Corpration and La Manufacture Francaise Des Pneumatiques Michelin the sum of One Hundred Thousand ($100,000.00) Dollars, Actual Damages and her costs of action.

Dated at Charleston, South Carolina, this 30th day of March, 1981.

ENTERED
3/30/81

Miller C. Foster, Jr.
MILLER C. FOSTER, JR.
Clerk of Court

/s/ By Patricia M. Chisolm
PATRICIA M. CHISOLM
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action File No. 77-1350-2

FLETCHER L. FALLAW, By Maudell H. Fallaw,
Guardian Ad Litem

Plaintiff

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCAISE DES
PNEUMATIQUES MICHELIN

FILED
Mar 30 1981
MILLER C. FOSTER, JR.,
Clerk
Charleston, S.C.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable C. WESTON HOUCK, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the Plaintiff Fletcher L. Fallaw, by Maudell H. Fallaw, Guardian Ad Litem, recover of the defendants Michelin Tire Corporation and La Manufacture Francaise Des Pneumatiques Michelin the sum of One Million, Two Hundred Fifty Thousand ($1,250,000.00) Dollars, Actual Damages and his costs of action.

Dated at Charleston, South Carolina, this 30th day of March, 1981.

ENTERED
3/30/81

Miller C. Foster, Jr.
MILLER C. FOSTER, JR.
Clerk of Court

/s/ By Patricia M. Chisolm
PATRICIA M. CHISOLM
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

Civil Action File No. 77-1352-2

SOUTHEASTERN FREIGHT LINES

Plaintiff

v.

MICHELIN TIRE CORPORATION and
LA MANUFACTURE FRANCAISE DES
PNEUMATIQUES MICHELIN

Defendants

FILED
Mar 30 1981
MILLER C. FOSTER, JR.,
Clerk
Charleston, S.C.

JUDGMENT

This action came on for trial before the Court and a jury, Honorable C. WESTON HOUCK, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the Plaintiff Southeastern Freight Lines recover of the defendants Michelin Tire Corporation and La Manufacture Francaise Des Pneumatiques Michelin the sum of Twenty Thousand Five Hundred ($20,500.00) Dollars Actual Damages and their costs of action.

Dated at Charleston, South Carolina, this 30th day of March, 1981.

ENTERED
3/30/81

Miller C. Foster, Jr.
MILLER C. FOSTER, JR.
Clerk of Court

/s/ By Patricia M. Chisolm
PATRICIA M. CHISOLM
Deputy Clerk

ORAL PRONOUNCEMENTS OF DISTRICT JUDGE, HONORABLE C. WESTON HOUCK, JULY 9, 1981

[10] We now come to the question of the conduct of the jurors. It's very disturbing to me that we would go to the trouble that we do go to in asking questions and then find out that either the parties don't hear the questions, or they don't pay any attention to them, and it disturbs me that that's the case here. It disturbs me that you did not have all of the knowledge that you should have and all of the knowledge that I sought to make available to you in order to intelligently select this Jury. But I think in a situation like this, the case law that I think is applicable [11] requires me to go a little bit further. I'm sure that the reason for that is that we have got to balance this thing out.

We can't come in and try a case for an extended period of time and then just because of one little miscue that a juror failed to reveal or one big miscue, depending on which side of the table you are sitting on, we try it all over again. As you said, Mr. Logan, if we did that, we would be endeavoring to give all parties a perfect trial rather than a fair trial, and I think a fair trial does not require that.

As I understand the Rule, you are entitled to a correct answer on Voir Dire. The fact that I'm not required to put them on Voir Dire, I don't really think makes any difference. I have not studied all of the cases that have been cited to me in such depth as to determine the circumstances under which the Voir Dire questions were asked. I dare say in some Districts or some States, it may be mandatory. Certainly in this State in this District, as I understand it, my asking the Voir Dire questions in a civil action is a courtesy to the attornevs. At least that's the way I approach it. I approach it that way, because it doesn't make any difference, I am going to ask them anyway, but it would be interesting to know whether in [12] those questions, we found out that the questions were mandatory, and whether the Courts would look at that differently or not. But I am not going to look at it from that standpoint, because I think no matter what reason I give for asking the questions, certainly

you are entitled to rely on the answers, and by "you," I mean all parties, and that's the purpose of them, and I think you are entitled to truthful answers.

The dilemma we're in here is we have got less than truthful answers, and just how untruthful they have to be before we do it all over again is our decision. I think the courts say in order to grant a new trial under such circumstances, that I must find at least one of two things: First, that the failure to answer was intentional; or that it was prejudicial.

Now, I have a hard time making a two-prong test out of that. I prefer to rely on the prejudicial nature of it and ignore whether it was inadvertent or whether it was intentinoal, because I think really they all merge together. I can't see any reason for placing such great inferences on the intent unless you go assume thereby that anybody that intentionally mis-answers a question must have it in for one of the parties, and, therefore, he is out to do them wrong on the case. I really can't see why there's so much emphasis placed [13] on the intentional part of it, but the law is that, and I am going to deal with it in that way.

I find in this case that none of the questions were answered untruthfully or that truthful answers were not given intentionally by the jurors that you have called. The burden is on the Defendants to establish that, and I do not think that you have established it.

Mrs. Pennington, I'm satisfied with her explanation. She said that she had a blowout in the latter 60's or early 70's while driving a 1962 or '63 Cadillac. She said it was so insignificant she did not remember it at the time of the Voir Dire. I haven't read the entire transcript of what took place, but in thumbing through it, I did note on page eighteen that she stood up and says, "I am Ruby Pennington. My brother-in-law drives for Global Truck Lines."

It seems to me that in her particular case, the fact that she stood up and admitted that her brother-in-law was a truck

driver seems to me that that weighs heavily against her intentionally keeping from the you the question of the blowout. I think her explanation is sufficient, and I accept it. I do not think that there is any showing or sufficient showing in this case that her failure to answer that question concerning a [14] blowout was intentional.

Edna Elmore, of course, you have explained why she was questioned. She said that she did not have a blowout. Absent any other proof to the contrary, therefore, I must assume that she answered the question truthfully. The only other proof was that Lester Carrigg said that to the best of her recollection the two people that mentioned it were Mrs. Pennington and Mrs. Elmore. I think the record will clearly show that Mrs. Carrigg was far from positive on it, and I don't think that her statement that to the best of her recollection it was Mrs. Elmore would be sufficient to establish to my satisfaction that Mrs. Elmore improperly answered the question in the face of her denial that she had ever had a blowout.

Lester G. Carrigg. She stated that to the best of her recollection, two jurors, Mrs. Pennington and Mrs. Elmore, mentioned during the week, and I am sure she meant during the trial of the case and not during deliberations, that they had a blowout. There's no evidence that they compared the tire in her case or in their case with the tire in this case. There's not testimony that they brought out the circumstances under which they had a blowout. The only testimony was that they mentioned that they had a blowout during [15] the trial. We don't know who the other juror was. We do know that one of them was Mrs. Pennington, and I have already stated that I do not think that her failure to answer the question concerning blowouts was an intentional failure. Obviously, I can't say about the other one, because I don't know who it was, I don't know the circumstances, so I am just going to say in that case I think the Defendants have failed to carry the burden of establishing that that failure, if in fact here was such a failure, was an intentional one.

Mrs. Carrigg herself admitted on the stand, I gather much to the surprise of all the attorneys, but probably more to the surprise of Mr. Smith than anyone else, that she herself had a blowout. She was not asked any particulars as to why she didn't answer the question when I asked it, and, therefore, I cannot say that you have established that she intentionally failed to answer that question, because she wasn't asked that question, and I think the burden was on you to bring that out. She did say that she hit a curb and the tire blew out there, which would seem to me to be—I don't even know whether you would call that a blowout or not. I think of a blowout is if you are riding down the road and the tire blows out. I don't think of it if you are running into a building and [16] knock a hole in the tire, so there is no attempt to show that she intentionally didn't answer the question, but based upon her explanation, it seems to me that a reasonable inference would be that reasonable men would differ as to whether or not you would really call that a blowout. I would have some doubts in my mind as to whether that would be one.

The second prong of the test, as I see it, is prejudice. As to the question of the blowout, I just can't see where there's any prejudice. There's no testimony that there was any attempt to analyze this accident based upon what happened in an earlier blowout. There's no evidence that there was any similarity between the others' blowouts that the jurors experienced and the one in this case. There's just no similarity at all between them. There's no way that I think a reasonable man could conclude, I hope I'm a reasonable man, that your rights to a fair trial were prejudiced by the failure of these jurors to disclose that they had had these prior experiences, and I find that you were not prejudiced because of their failure to accurately answer the Voir Dire questions concerning blowouts.

Caryl C. Polk. She said she didn't hear me. That's very difficult for me to accept because as Mr. [17] Logan has mentioned, I went into it very carefully. If I said "Plaintiff" or "Defendant," then I can see where somebody would become confused with that, but I said, "Has anybody ever sued you for

any money or you ever sued anybody for any money?" I think a five-year-old kid ought to know what I was talking about, at least know enough to answer the question.

I sat here throughout the trial and watched her. I selected her as Foreperson. I don't select a Foreperson until well into the trial. I don't recall when I did it in this case, but most of the time I don't do it until the end of the trial. I do it because I think that person is the best qualified person to be in charge of that Jury. I would think I did it either right before I charged the Jury or right before you argued the case to the Jury. Sometimes in terms where I hear more than on case and kind of get to know a Jury, I might do it at the beginning, because I know who I am going to select, but with only one case being tried at this term, in all probability I didn't select her until the end.

Obviously, I thought she was paying attention. She was taking notes, and I think I might have picked up on it if I thought she was deaf. She seemed to me like she could hear pretty good, so it's hard for me [18] to see how she could hear what was going on in this courtroom but then say that she didn't hear it.

This is where it gets difficult for me, because this is the point where I think that two-prong requirement of either intentional failure to tell the truth, answer Voir Dire questions, or prejudicial failure is sufficient for a new trial, because I think that it ought to be just prejudicial, because here I really can't see where there's any possibility of prejudice. I mean it is just difficult for me to see how her experience of having these losses could possibly have prejudiced the Defendants in this case. I just can't see—oh, I say, "possibly," anything is possible, but that experience doesn't raise any inference at all to me of prejudice against the Defendants in this case.

When the lack of prejudice is so strong, then it seems to me I have to balance that with the strength of the establishment that it was an intentional thing, because I think her acts appear to me to have been much more intentional say than Ms. Pennington. I just can't understand why she didn't hear it, but I'm

not convinced that she did hear it. She said she didn't hear me. There's no evidence that she didn't hear it except the fact that a lot of people sitting around her did, but I am going to find that she didn't intentionally fail to answer the question, and I'm going to find that there is no prejudice resulting to the Defendants as a result of that failure.

I don't think that the verdicts in these cases are contrary to the law, contrary to the instructions of this Court as to the law or contrary to the greater weight of the evidence. I think it was a horse race. I think it was a question of fact. I think that it was submitted to the Jury properly on adequate instructions and that they found the facts in favor of the Plaintiff, and I don't think that finding was contrary to the law, instructions or greater weight of the evidence. It was amply supported by the law and by the facts, and I think that your Motion in that regard must be denied.

* * *

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1830
C/A 77-1348, 77-1350
& 77-1352

MAUDELL H. FALLAW, FLETCHER L. FALLAW;
SOUTHEASTERN FREIGHT LINES,
Plaintiff-Appellees,

v.

MICHELIN TIRE CORPORATION; LA MANUFACTURE
FRANCAISE DES PNEUMATIQUES MICHELIN,
Defendant-Appellants.

FILED
Aug 19 1980
U.S. Court of Appeals
Fourth Circuit

FILED
Aug 25 1980
Miller C. Foster, Jr., Clerk

ORDER

The above matter came before the undersigned in Baltimore, Maryland on July 7, 1980 for argument.

This was an Interlocutory Appeal from an Order of Judge Robert W. Hemphill ordering the appellant to produce certain design, manufacturing and production specifications of appellant's tire which was opposed on the grounds that the information sought consisted of trade secrets of the appellant.

During the argument of the case, the Plaintiff-Appellees' and Defendant-Appellants' counsel agreed that the issue upon which liability would be determined was whether the tire in

question blew out without being penetrated by an external object, or whether the blowout was caused from the penetration of an external object. It is stipulated by and between counsel for all parties that in the trial of this case the liability of the Defendant-Appellants shall be determined by this issue. If the Plaintiff-Appellees prove to the satisfaction of the jury that the tire in question blew out from a cause other than that of penetration from an external object, the Defendant-Appellants shall be responsible for those damages and injuries proximately caused to the Plaintiff-Appellees. If the jury determines that the blowout was caused by penetration from an external object, then the Defendant-Appellants shall not be responsible for the damages and injuries resulting from the blowout. The Trial Court shall give an appropriate instruction so that the jury will have some understanding with regard to the issue being thusly narrowed.

With the consent of this Court it is agreed that in accordance with the above that the production of the design, manufacturing and production specifications which are required to be produced by the Order of the District Court shall not be produced. Further in accordance with the above, it is agreed that the manner in which the tire in question, or other tires for that matter, were manufactured shall not be relevant issues in this litigation. The Plaintiff-Appellees shall not be required to prove that the tire was negligently designed or manufactured, that the tire was defective in design or manufacture, or that a warranty was breached, either expressed or implied, by the Defendant-Appellants. Likewise, the Defendant-Appellants will not be required to introduce into evidence or divulge or otherwise prove any matters regarding the design, manufacture or production of the tire which is the subject of this litigation, or any other tires produced by them.

Therefore this appeal is dismissed and the case is remanded to the District Court of South Carolina to go forward in accordance with this stipulation and the parties are granted the right

to continue discovery until October 30, 1980, in view of these developments.

AND IS SO ORDERED.

/s/ Harrison L. Winter
HONORABLE HARRISON L. WINTER

/s/ John D. Butzner, Jr.
HONORABLE JOHN D. BUTZNER, JR.

/s/ Francis D. Murnaghan, Jr.
HONORABLE FRANCIS D. MURNAGHAN, JR.

Baltimore, Maryland

WE CONSENT:

WE CONSENT:

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William K. Slate, II, Clerk

/s/ BY: Gail M. Amory
GAIL M. AMORY
Deputy Clerk

Office - Supreme Court, U.S.
FILED
OCT 4

No. 82-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MICHELIN TIRE CORPORATION and LA MANUFACTURE FRANCAISE DES PNEUMATIQUES MICHELIN,
Petitioners,

v.

MAUDELL H. FALLAW; FLETCHER L. FALLAW; SOUTHEASTERN FREIGHT LINES,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

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IN THE

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MICHELIN TIRE CORPORATION and LA MANUFACTURE FRANCAISE DES PNEUMATIQUES MICHELIN,

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v.

MAUDELL H. FALLAW; FLETCHER L. FALLAW; SOUTHEASTERN FREIGHT LINES,

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

The purpose of this supplemental brief is to call to the Court's attention the recent decision of the United States Court of Appeals for the Tenth Circuit in the case of *Greenwood* v. *McDonough Power Equipment, Inc.*, No. 80-1698 (10th Cir. Sept. 3, 1982), which is attached as an appendix.

Petitioner submits that this decision demonstrates the continuing conflict among the circuits on the question presented for review.

Respectfully submitted,

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By _____
John M. Kenney

United States Court of Appeals

FOR THE TENTH CIRCUIT

SLIP OPINION

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 80-1698

BILLY G. GREENWOOD, *et al.*,
Plaintiffs-Appellants,

v.

MCDONOUGH POWER EQUIPMENT, INC.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. Civil 77-4087)

FILED
United States Court of Appeals
Tenth Circuit
September 3, 1982
HOWARD K. PHILLIPS
Clerk

Dan L. Wulz (Gene E. Schroer with him on the brief) of Jones, Schroer, Rice, Bryan & Lykins, Topeka, Kansas, for Plaintiffs-Appellants.

Donald Patterson (Steve R. Fabert with him on the brief) of Fisher, Patterson, Sayler & Smith, Topeka, Kansas, for Defendant-Appellee.

Before BARRETT and MCKAY, Circuit Judges, and BRIMMER, District Judge.*

---

* Chief Judge of the United States District Court for the District of Wyoming, sitting by de. gnation.

McKAY, Circuit Judge.

Billy G. Greenwood and his parents, John and Freda Greenwood, appeal from an adverse jury verdict and related judgment in a products liability action predicated upon strict liability. Jurisdiction rests upon diversity of citizenship. The facts will be discussed only insofar as relevant for purposes of our decision.

On May 25, 1976, Jeff Morris, thirteen years of age, was mowing the Morris yard on a riding mower manufactured by appellee, McDonough Power Equipment, Inc., pursuant to his father's instructions. Jeff had previously operated the mower approximately thirty hours over a three- to four-year period.

On this particular day, Troy Greenwood, Billy's older brother, was riding on the mower with Jeff. The Morrises and Greenwoods were next-door neighbors. While operating the mower, Jeff watched the left front wheel to make certain that he was getting an even cut. Jeff was aware that Billy, two years of age, and several other children, were playing at and around a swingset in the back yard, approximately 25 feet from the area where he was mowing.

While Jeff was mowing the yard, Billy, undetected by Jeff, approached the mower to pick up a doll in the path of the mower. Immediately prior to the accident, Jeff, upon realizing that Billy was in the path of the mower, shouted "watch out." Fearing that he could not stop in time, Jeff turned the mower to the right to avoid hitting Billy. During the course of the turn, the left front tire of the mower went over Billy's left foot. Billy subsequently kicked at the mower with his right foot but both feet went under the mower where they contacted the mower blade, resulting in the loss of both feet.

At the time of the accident, Freda Greenwood was in her home doing housework. Although she was aware that Troy and Billy were playing in the Morris yard, she was unaware that

Jeff was mowing the yard until Troy notified her of the accident.

In their complaint, the Greenwoods alleged that: the mower was of defective design and workmanship and negligently constructed; the defects of the mower were hidden and latent and could not be discovered by general observation or superficial examination; the defects were due to McDonough's negligence; the mower was not fit for its intended purpose; Billy sustained permanent disability; and that they, as Billy's parents, sustained severe emotional shock and damages.

In its answer, McDonough denied that the mower was negligently or improperly designed or that it was unfit for its intended use. McDonough also alleged that Billy's injuries were caused by the combined negligence of Ira Morris (Jeff's father), as the owner of the mower, Jeff Morris, as the operator of the mower, and John and Freda Greenwood, as the persons responsible for Billy's supervision.

Following several pretrial motions, the case proceeded to trial on the basis of strict liability. The Greenwoods alleged that the mower was defective in that: the blade was below the deck of the mower; the blade bar, as manufactured, was not within McDonough's manufacturing tolerances thus causing the blade level to be below the deck, aggravating the injury to the left foot; the blade was improperly designed; the blade brake-clutch was defectively designed because it did not provide a deadman control for stopping, and because of its lack of durability.

The trial extended over a three-week period. McDonough's defense throughout trial was that the mower was not defectively designed and that the combined negligence of the Morrisses and Greenwoods gave rise to the accident and consequent injuries sustained by Billy. The jury, in accordance with Kansas law, was allowed to compare the fault of McDonough, Jeff Morris, Ira Morris, and Freda Greenwood. *See* Kan. Stat. Ann. § 60-258a (1976). The jury returned a verdict finding McDonough 0% at fault, Jeff Morris 20% at fault, Ira

Morris 45% at fault, and Freda Greenwood 35% at fault. The jury assessed damages at $0.00. Upon being instructed by the trial court that, inasmuch as Billy had lost both feet he had definitely suffered some damages, the jury reconvened for further deliberations and found that Billy had been damaged in the amount of $375,000.00. The district court thereafter entered judgment that Billy take nothing, that the action be dismissed on the merits, and that McDonough recover its costs.

The Greenwoods contend the district court erred in denying their motion to approach the jurors and in denying leave to subpoena the jurors to give testimony at the hearing on their motion for a new trial. They also contend they are entitled to a new trial because their right to peremptory challenge was impaired.

The judgment in favor of McDonough was entered on April 25, 1980. On April 29, 1980, the Greenwoods filed a motion to approach the jurors contending that "plaintiffs are of recent information and belief that the jury foreman's, Mr. Payton, son may have been injured at one time, which fact Mr. Payton did not state in response to juror voir dire questions." Record, vol. 2, at 325.

The Greenwoods' attorney, in his *voir dire*, had asked the prospective jurors:

> Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain or suffering, that is you or any members of your immediate family?

Record, vol. 21, at 39. One juror answered affirmatively, and after additional questioning by Greenwoods' attorney as to his impartiality, was allowed to remain on the jury. Mr. Payton did not respond.

On April 30, 1980, the district court entered a memorandum and order denying the Greenwoods' motion to approach the jurors. The district court summarized its denial of the motion by observing that interviews of jurors by persons connected with a case are not favored except in extreme situations, citing *Stein* v. *New York*, 346 U.S. 156 (1953), and *McDonald* v. *Pless*, 238 U.S. 264 (1915). The district court also adopted, by appending, *Silkwood* v. *Kerr-McGee Corp.*, 485 F. Supp. 566 (W.D. Okl. 1979), declaring it "controlling here."

On May 1, 1980, the Greenwoods filed a second motion to approach the jurors which states:

> Counsel for plaintiff shows to the court that to our best recollection and belief, Juror Payton did not answer counsel's question in the affirmative as to whether he or any member of his immediate family had ever been seriously injured. The Affidavit of John G. Greenwood attached affirms that Juror Payton's son was seriously injured in a truck tire explosion. Had voir dire questions been answered truthfully, further examination may have revealed grounds to challenge Juror Payton for cause, or affected counsel's decisions with respect to peremptory challenges.

Record, vol. 2, at 345. On May 5, 1980, the district court entered an order granting, in part, the Greenwoods' second motion:

> Upon due consideration, but cognizant of the parties' need for a speedy ruling, the Court, in an abundance of caution, has determined to grant the motion in a limited degree. The motion will be generally overruled with the exception that counsel for plaintiff will be allowed to inquire of juror Ronald Payton regarding alleged injuries sustained by his son from the explosion of a truck tire.
>
> The inquiry should, of course, be brief and polite. Defense counsel must be present. The witness should not be unnecessarily inconvenienced. The inquiry should be undertaken telephonically or at a place convenient to the juror. The juror should not be summoned to Topeka solely for this purpose.

> Counsel should be informed that the Court's review of the court reporter's notes of *voir dire* indicates that plaintiff's counsel's question should have elicited a response from the juror only if (1) his son was in an accident as alleged *and* (2) the son sustained a disability or suffered prolonged pain.

Record, vol. 2, at 348.

Counsel for both parties subsequently arranged for a conference call interview with juror Payton. During the course of the interview, which was not preserved as part of the record herein, juror Payton related that his son had received a broken leg as the result of an exploding tire. According to counsel for the Greenwoods, Payton related that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life," and that "all his children have been involved in accidents." Appellants' Brief at 7. According to McDonough's counsel, Payton "did not regard [his son's broken leg] as a 'severe' injury and as he understood the question [the injury] did not result in any 'disability or prolonged pain and suffering'. As far as Mr. Payton is concerned he answered counsel's question honestly, and correctly, by remaining silent." Appellee's Brief at 18.

Both parties cite *Photostat Corp.* v. *Ball*, 338 F.2d 783 (10th Cir. 1964), in support of their respective positions that Mr. Payton's failure to disclose his son's accident during *voir dire* did, or did not, prejudice the Greenwoods' right of peremptory challenge.

In *Photostat* we held that when four prospective jurors in a negligence case arising out of an automobile accident withheld information as to their personal involvement in accidents with resulting claims, for which they were paid, a defendant was entitled to a new trial because of the prejudice to his right of peremptory challenge, even assuming that the jurors had good

intentions and were not disqualified for cause. In *Photostat* we observed:

> In Consolidated Gas and Equipment Company of America v. Carver, 10 Cir., 257 F.2d 111, we recognized the burden on the complaining litigant in a post-verdict hearing to show that failure of a juror to fully and truthfully answer questions propounded to the panel concerning his experience in similar litigation resulted in prejudice to his cause. We embraced the settled rule which moves the court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant. Courts act on probabilities, not possibilities, and if the suppressed information is so "insignificant or trifling" as to indicate only a remote or speculative influence on the juror, the right of peremptory challenge has not been affected. See also Crutcher v. Hicks (Ky.), 257 S.W.2d 539, 38 A.L.R. 2d 620.
>
> The prospective juror in Consolidated Gas and Equipment Company of America v. Carver, supra, was then a plaintiff in a state court suit for actual and exemplary damages. And, the suit in which he was a plaintiff and the one in which he was a prospective juror "bore marks of similarity." In these circumstances we were of the view that if the juror had disclosed the pendency of his action in the state court, he would have been excused for cause, and if not for cause, the defendent would have exercised one of his peremptory challenges; that "*[w]hether so intended or not, the effect of the silence of the juror was to deceive and mislead the court and the litigants in respect to his competency*. And such deception and misleading had the effect of nullifying the right of peremptory challenge as completely as though the court had wrongfully denied such right." Id. p. 115.
>
> In this post-mortem inquiry, we cannot know of course what counsel would have done with the suppressed information. Nor can we take his post-mortem word for it. But we need not presume to speculate on the judgment he would have made. *It is enough, we think, to show probable bias of the jurors and prejudice to the unsuccessful litigant if the suppressed information was of sufficient cogency and significance to cause us to believe that counsel was entitled to know of it when he came to exercise his*

> *right of peremptory challenge*. If so, the suppression was a prejudicial impairment of his right.

338 F.2d at 786-87 (emphasis added).

Under *Photostat*, the failure of a juror to fully and truthfully answer questions propounded to the panel is deemed reversible error upon a showing of probable bias of the juror with consequential prejudice to the unsuccessful litigant. The withholding of insignificant or trifling information indicative of only a remote or speculative influence on the juror is not deemed prejudicial. A new trial is required, however, if the suppressed information is of "sufficient cogency and significance" to cause us to believe that counsel was entitled to know of it when he came to exercise his right of peremptory challenge. *Id.* at 787.

Applying these standards, we hold that juror Payton's failure to answer the question posed on *voir dire* prejudiced the Greenwoods' right to peremptory challenge, thus necessitating a new trial. We think the unrevealed information was of "sufficient cogency and significance" that the Greenwoods' counsel was entitled to know of it in deciding how to use his peremptory challenges.[1] The test is an objective one: the fact that the juror failed to disclose important information

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[1] McDonough argues that Mr. Payton probably would not have been peremptorily challenged and therefore plaintiffs were not prejudiced. It bases this contention on the fact that two other prospective jurors responded that members of their family had been injured, and after further questioning by plaintiffs' counsel, were allowed to remain on the jury. We agree with plaintiffs that this argument has no merit, since "[t]he test is whether counsel was entitled to know the suppressed information, not whether counsel might have, would have, or probably would have acted on the information." Appellants' Reply Brief at 12; *see* Photostat Corp. v. Ball, 338 F.2d 783, 787 (10th Cir. 1964). An inquiry based on whether counsel would have challenged the juror would be unworkable. Not every suspicious answer to a *voir dire* question leads to a peremptory challenge. Rather, counsel must exercise his intuitive judgment about the prospective

unintentionally, or as a result of a misunderstanding of the *voir dire* question, does not foreclose the conclusion that the right to peremptory challenge was substantially impaired. *Id.* at 785, 787. The unrevealed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes a serious injury. The prejudice to the Greenwoods was exacerbated by the fact that Mr. Payton became the jury foreman. We accept as true that Mr. Payton did not intentionally conceal the information and held a good-faith belief that his son's injury was not a serious one resulting in disability or prolonged pain and suffering. Good faith, however, is irrelevant to our inquiry. *Id.* at 785. If an average prospective juror would have disclosed the information, and that information would have been significant and cogent evidence of the juror's probable bias, a new trial is required to rectify the failure to disclose it. These conditions were met here.

We therefore reverse and remand this case to afford plaintiffs the opportunity to select a new jury and present their evidence in a new trial.[2]

REVERSED AND REMANDED.

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juror based not only on what the juror says but also on non-verbal cues indicative of the juror's mental attitude toward the merits of the case and the parties. This opportunity to judge the character and attitudes of the prospective juror may persuade counsel that the juror is capable of fairly and impartially deciding the client's cause despite the giving of an answer indicative of possible bias. It is the opportunity to assess the prospective juror that is important, not whether the juror ultimately is challenged as a result of the opportunity.

[2] We emphasize that plaintiffs' cause of action is not a groundless one. The district court found plaintiffs' evidence sufficiently substantial to justify submission of their theory of liability to the jury. We are therefore satisfied that our remand for a new trial is not an exercise in futility.

No. 80-1698

BILLY G. GREENWOOD, *et al.* v. MCDONOUGH POWER EQUIPMENT, INC.

BARRETT, Circuit Judge, dissenting:

I respectfully disagree with the majority's view that juror Payton's failure to disclose his son's accident during *voir dire* prejudiced Greenwood's right of peremptory challenge under our *Photostat Corp.* v. *Bill* [sic].

The record does not indicate that juror Payton, by his silence, improperly answered the court's *voir dire* query as to whether he or any member of his family had sustained any injuries resulting in any disability or prolonged pain or suffering. Payton simply did not consider his son's broken leg received as the result of an exploding tire, to be an injury resulting in disability or prolonged pain and suffering. He so stated during the post-trial telephone interview. That statement, in my view, does not imply that Payton believed that Billy's injuries did not give rise to a disability or prolonged pain and suffering.

Payton's expressed belief that his son's broken leg did not result in a disability or prolonged pain and suffering must be considered in the context of risks that a parent recognizes in the everyday life of growing children. It does not establish probable bias with consequential prejudice to the Greenwoods. This conclusion is justified, I believe, in light of the unanimous jury assessment of Billy's damages in amount of $375,000.00.

If juror Payton had been prejudiced against Billy's injuries to the extent indicated, it is inconceivable that he would have joined in assessing Billy's damages as $375,000.00. Thus, I would hold that there has been no showing of probable bias by juror Payton with consequent prejudice to Billy.

In lieu of complete reversal, I suggest that a partial remand to the trial court with instruction to conduct an evidentiary hearing into the issue of Payton's possible bias and prejudice is the proper course to be followed.

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CLERK

No. 82-266

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

Michelin Tire Corporation and La Manufacture Francaise Des Pneumatiques Michelin,
Petitioners,

v.

MAUDELL H. FALLAW; FLETCHER L. FALLAW;
SOUTHEASTERN FREIGHT LINES,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Were the District Court and the Court of Appeals below correct in denying a new trial upon a finding that there was no showing of intentional concealment or actual bias as a result of jury nondisclosure on *voir dire*?

LISTING PURSUANT TO SUPREME COURT RULE 28.1

The corporation Southeastern Freight Lines has no parent companies, subsidiaries or affiliates.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOURTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION

OPINIONS BELOW

Both the unpublished opinion of the United States Court of Appeals for the Fourth Circuit and the oral pronouncement made (in lieu of a written opinion) by the United States District Court for South Carolina are set out in the Appendix to the petition for a writ of certiorari.

STATEMENT OF THE CASE

These product liability actions were initiated to recover for the injuries and damages to Fletcher L. Fallaw, the injured driver, Maudell H. Fallaw, his wife, and Southeastern Freight Lines, all of which came about as a result of a defective Michelin* tire which blew out and caused a collision between a tractor-trailer rig and a tanker rig on July 15, 1975. As a result of that collision, Mr. Fallaw sustained severe and permanent brain damage requiring numerous hospitalizations and institutionalization for the remainder of his life. Mr. Fallaw was 52 years old at the time of his injury. The jury returned a verdict on March 30, 1981, assessing damages as follows: Mr. Fallaw: $1,250,000.00; Mrs. Fallaw's consortium claim: $100,000.00; and Southeastern's property damage claim: $20,500.00.

During *voir dire*, the entire jury venire was questioned by the district court judge as follows:

> Have any of you ever been a Plaintiff or a Defendant in an action brought for damages? If so, please stand and give your name.
>
> Has anyone ever sued you or have you ever sued anybody for money as a result of damages or injuries you or that other person allegedly sustained? If so, please stand.

Mrs. Caryl C. Polk, who did not respond, was selected as a juror by the parties. After the testimony and closing arguments by counsel were completed, Mrs. Polk was appointed as the foreperson as the district judge felt that she was the best qualified because of her close attention to the case. Some weeks after the jury had returned a verdict and

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* The Petitioners, Michelin Tire Corporation and La Manufacture Francaise Des Pneumatiques Michelin, shall be collectively referred to herein as "Michelin".

was discharged from the case, Michelin discovered that Mrs. Polk had brought a suit as a result of an automobile accident which occurred seven years earlier in 1974 and that she had also been involved in an automobile accident in December of 1980. This information was discovered by Michelin prior to a full evidentiary hearing which the district court held on July 9, 1981, wherein Mrs. Polk was subpoenaed by Michelin and testified concerning these accidents.

During the evidentiary hearing, Mrs. Polk, who had a hearing problem, tesitified she was not seated in the jury box during *voir dire*, but was in the rear of the courtroom with all other potential jurors. She had never been on a jury panel nor had she ever been in a courtroom. She testified that she did not hear the question concerning whether or not she had been sued or had sued anyone. Mrs. Polk stated that she did not intentionally or deliberately withhold information from the court and the trial judge so found.

The circumstances surrounding Mrs. Polk's automobile accident in 1974 did not bear any similarity to the circumstances resulting in the injury to Mr. Fallaw. She was a passenger in a stopped car which was rear-ended and no blowout was involved in that incident. Likewise, the injuries received in 1974 by Mrs. Polk in no way resembled or compared to those received by Mr. Fallaw and did not require hospitalization.

It is not clear whether Mrs. Polk filed suit with regard to the incident which occurred in December of 1980, however, the circumstances surrounding that incident were likewise not similar to the case at hand in that Mrs. Polk's incident involved her hitting a car which failed to stop for a stop sign. Again, no hospitalization was required. The trial judge ruled that Mrs. Polk had not failed to answer fully the *voir dire* questions as far as the 1980 incident was concerned. Mrs. Polk never made either the 1974 or 1980 automobile incidents known to any of the other jurors. The trial judge found, after

the evidentiary hearing, that Mrs. Polk did not intentionally fail to answer *voir dire* questions and that her experiences did not prejudice Michelin.

During *voir dire*, the court also propounded the following question to the entire jury venire:

> Have any of you or members of your immediate family, close friends or business associates ever operated or been a passenger in a vehicle when a tire blew out? If so, please stand and explain the circumstances.

In post-trial questioning, by means of a telephone survey, Michelin discovered that the juror Mrs. Pennington had been operating a vehicle when a tire blew out. She was subpoenaed by Michelin to testify at the evidentiary hearing regarding that incident.

During the hearing, Mrs. Pennington testified she was also seated in the audience with all other prospective jurors, as opposed to the jury box, and that this was her first experience in court. She did not recall her experience with the blowout at the time of *voir dire* because it was so insignificant and because it had occurred approximately ten years earlier in the late sixties or early seventies. She did not recall the experience until she was questioned during a lengthy phone conversation by counsel for Michelin after she had been dismissed by the court in the case. The experience that Mrs. Pennington had was not in any way similar to the facts in the case at hand. She did not remember the kind of tire involved or the nature of the problem with the tire, nor did she consider the tire to be defective in any way. She received no injuries nor filed a lawsuit as a result of the incident. She also testified that at no time did she knowingly withhold any information from the court.

Michelin learned for the first time during the post-trial evidentiary hearing on the motion for a new trial that Mrs. Carrigg, one of the jurors whom it had subpoenaed, had an experience comparable with a blowout a few years prior. Mrs.

Carrigg had steered her vehicle into a curb to avoid being hit by another vehicle and the impact with the curb caused her tire to deflate. Her experience in this instance was not similar to any of the facts in the case under consideration.

In determining whether to grant Michelin's motion for a new trial based on juror misconduct or impartiality, the district court applied a two-pronged test; *i.e.*, was the non-disclosure (1) intentional or (2) otherwise prejudicial. The court found that none of the jurors intentionally withheld information. Furthermore, the court concluded that juror Polk's litigation experience did not raise any inference or possibility of prejudice. Concerning the prior blowout experiences, the court found that juror Pennington had not recalled her experience with a blowout during *voir dire*, and expressed doubt that juror Carrigg actually had a blowout. Moreover, the court determined that both experiences were unlike the accident in the present case. Lastly, the court concluded that none of the jurors had discussed their experiences with any other jurors.

Contrary to Michelin's representation that juror non-disclosure must be intentional to warrant a new trial, the Fourth Circuit Court of Appeals, in a *per curiam* opinion applied the same two-pronged test as the district court in analyzing the post-verdict evidence. The court held:

> With respect to all three jurors, the district court found the absence of any intention to withhold information, and we accept that finding as not clearly erroneous. Had there been deliberate untruthfulness, at least when compounded by possible bias, defendants would have been entitled to a new trial. *See United States v. Bynum*, 634 F.2d 768, 771 (4 Cir. 1980); *McCoy v. Golstein* [sic], 652 F.2d 654, 658 (6 Cir. 1981). *But, here, where the non-disclosure was not deliberate, the only inquiry is whether the jurors' post-verdict responses disclosed actual bias or prejudice as a matter of law. See United States v. Vargas*, 606

> F.2d 341, 334 (1 Cir. 1979); *United States v. Mulligan*, 573 F.2d 775, 777 (2 Cir.), *cert. denied*, 439 U.S. 827 (1978). We think that these jurors' answers did not satisfy this test.

Appendix to the Petition at 5a (emphasis added). In essence, both the district court and the circuit court reviewed the evidence for some showing of actual bias, and found none.

REASONS FOR DENYING THE WRIT

As Chief Justice Hughes observed in *United States v. Wood*, 229 U.S. 123, 145-46, *rehearing denied*, 299 U.S. 624 (1936):

> Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula.

In the present case, the juror nondisclosures were not discovered until after the verdict had been rendered. To determine whether there had been an impartial trial, the district court held a post-verdict hearing in accordance with the decisions of this Court. *See Smith v. Phillips*, ____ U.S. ____, 102 S. Ct. 940 (1982). No prejudice was found by the trial judge. On appeal, the Fourth Circuit Court of Appeals carefully scrutinized the record to determine whether the nondisclosures evidenced prejudice. No demonstration of manifest prejudice was found. *See Irvin v. Dowd*, 366 U.S. 717, 723-24 (1961) (recognizing that trial court determination of impartiality should only be set aside where prejudice is manifest). Michelin has been afforded a full and fair hearing and a review of the merits of its claim. Not satisfied, it now seeks a grant of certiorari to obtain a further ruling by the United States Supreme Court on a matter which, it asserts, has never been expressly addressed by this Court. There is, however, no reason why this Court should address this issue. As Chief Justice Hughes pointed out, there are no constitutional issues

presented by the procedure or test used to determine impartiality. *See United States v. Wood, supra.* Simply because a question has not been resolved by this Court is not a basis for the grant of certiorari.

1. Michelin misinterprets the case law when it initially argues that the Fourth Circuit Court of Appeals below has rendered a decision in conflict with other federal circuit courts, inferring that some circuits require a showing of intentional jury nondisclosure in order to warrant a new trial. (Michelin's Petition p.4). While intentional or deliberate nondisclosure may be significant in proving or even presuming juror impartiality, the central and ultimate issue concerns actual bias or prejudice, and when proved, a new trial may be ordered even if the nondisclosure was innocent. In this regard, there is no real conflict among the federal circuit courts. The uniform rule is that a new trial will not be granted simply because a juror fails to properly disclose information on *voir dire*. Rather, when the issue of juror partiality is raised, the unsuccessful litigant is required to show actual prejudice. All circuit courts have had occasion to apply this uniform rule. *United States v. Vargas*, 606 F.2d 341, 344-45 (1st Cir. 1979); *United States v. Mulligan*, 573 F.2d 775, 777-78 (2nd Cir.), *cert. denied*, 439 U.S. 827 (1978); *United States v. Woods*, 364 F.2d 481-483 (3rd Cir.), *cert. denied*, 385 U.S. 972 (1966); *Vezina v. Theriot Marine Service, Inc.*, 554 F.2d 654, 656 (5th Cir. 1977); *United States v. Robbins*, 500 F.2d 650, 653 (5th Cir. 1974); *McCoy v. Goldston*, 652 F.2d 654, 658-59 (6th Cir. 1981); *United States v. Currie*, 609 F.2d 1193, 1194 (6th Cir.), *cert. denied*, 445 U.S. 928 (1980); *Stanczak v. Pennsylvania Railroad*, 174 F.2d 43, 48 (7th Cir. 1949); *United States v. Whiting*, 538 F.2d 220, 223 (8th Cir. 1976); *United States v. Sockel*, 478 F.2d 1134, 1137 (8th Cir. 1973); *Jackson v. United States*, 408 F.2d 306, 309 (9th Cir. 1969); *Williams v. United States*, 418 F.2d 372, 377 (10th Cir. 1969); *Rogers v.*

McMullen, 673 F.2d 1185, 1188-90 (11th Cir. 1982); and *Carpenter v. United States*, 100 F.2d 716, 717 (D.C. Cir. 1938).

In the case at hand, the Fourth Circuit below addressed the issue as to whether or not the nondisclosures were intentional, but more importantly, it addressed the issue of juror impartiality, and found that the jurors' post-verdict responses did not disclose actual bias or prejudice as a matter of law.

Decisions of this Court lend firm support to the rule developed in the federal circuits. In a variety of circumstances evidencing potential juror partiality, this Court has repeatedly held that absent a showing of actual bias, there is no basis for granting a new trial. *See Smith v. Phillips*, *supra*, 102 S. Ct. at 945-46 (juror had job application pending with prosecutor's office during criminal trial); *Chandler v. Florida*, 449 U.S. 560, 581-82 (1981) (radio, television and photographic coverage of criminal proceedings); *Beck v. Washington*, 369 U.S. 541, 557-58, *rehearing denied*, 370 U.S. 965 (1962) (potentially inflammatory pretrial publicity); *Dennis v. United States*, 339 U.S. 162, 171-72, *rehearing denied*, 339 U.S. 950 (1950) (juror's occupation as government employee); *United States v. Reid*, 12 How. 361, 366 (1851) (jurors read newspaper accounts of prosecution while trial was still in progress). Thus, alleged unfairness as a result of juror bias must be sustained, not as a matter of speculation, but as a demonstrable reality. *Darcy v. Handy*, 351 U.S. 454, 462 (1956).

Michelin's claim of disagreement among the circuits is based on the decisions in *Photostat Corporation v. Ball*, 338 F.2d 783 (10th Cir. 1964) and *Consolidated Gas & Equipment Company of America v. Carver*, 257 F.2d 111 (10th Cir. 1958). It is noteworthy that the Tenth Circuit Court of Appeals recognized the uniform burden regarding a showing of juror prejudice in stating:

In Consolidated Gas and Equipment Company of America

> *v. Carver*, 10 Cir., 257 F.2d 111, we recognized the burden on the complaining litigant in a post-verdict hearing to show that failure of a juror to fully and truthfully answer questions propounded to the panel concerning his experience in similar litigation resulted in prejudice to his cause. We embraced the settled rule which moves the court to act only upon a showing of probable bias of the juror with consequent prejudice to the unsuccessful litigant.

Photostat Corporation v. Ball, *supra*, 338 F.2d at 786. Both *Photostat* and *Consolidated* indicated that juror nondisclosure on *voir dire* substantially impaired the right of peremptory challenge and, hence, established an irrebuttable presumption of prejudice, however, these cases have no precedential value. First, each case involved an extraordinary fact situation. In *Consolidated*, a juror failed to disclose his own pending action for damages based on serious injuries remarkably similar to those suffered by the plaintiff in the suit for which he was chosen as a juror. In *Photostat*, four jurors failed to disclose at least ten different claims and accidents. In the present case, the nondisclosures did not conceal an extreme similarity of circumstances as in *Consolidated* nor did they approach the number of nonresponsive answers found in *Photostat*. Second, the state court precedent upon which both cases relied has been significantly underminded. *See Beanland v. Chicago, Rock Island & Pacific Railroad*, 345 F. Supp. 227, 229 (W.D. Mo. 1972). Third, more recent case law demonstrates that the Tenth Circuit is in accord with the uniform rule:

> In the absence of a showing of actual bias or an intentional withholding of the facts, there is little in the record from which the court can conclusively presume that the non-disclosure was obvious disqualification and inherent prejudice as a matter of law.

Williams v. United States, *supra*, 418 F.2d at 377 (footnote omitted) (fact that juror might have been peremptorily

challenged is not alone sufficient to reverse). Michelin fails to mention in its petition this more recent pronouncement by the Tenth Circuit Court of Appeals. Thus, Michelin's claim that the federal system lacks a consistent analytical approach to the effect of juror nondisclosure on *voir dire* is without merit.

2. Michelin's second ground for review rests on the contention that nondisclosure on *voir dire* constitutes an impairment of the right to exercise peremptory challenges. Hence, Michelin states that the applicable decisions of this Court mandate a new trial without a showing of prejudice, citing *Swain v. Alabama*, 380 U.S. 202, 219 (1965) (Michelin's Petition p.7). Michelin's argument is fatally flawed because it would lead to an absurd result. If every nondisclosure, no matter how inadvertent or harmless, is considered automatic grounds for a new trial, litigation often will be unconscionably prolonged. As Mr. Justice Holmes pointed out in a case involving alleged juror bias, "[i]f the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Holt v. United States*, 218 U.S. 245, 251 (1910). That no due process violation was committed was further confirmed just this year by this Court in *Smith v. Phillips*, *supra*.

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as *voir dire* and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ... held in this case.

102 S. Ct. at 946 (footnote omitted). *See also United States v. Vargas, supra,* 606 F.2d at 346 (holding that right of peremptory challenge was not impaired absent showing juror nondisclosure actually prejudiced case); *Williams v. United States, supra,* 418 F.2d at 377 (to the same effect). This Court also said in *Smith v. Phillips*:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

102 S. Ct. at 945.

3. Michelin, as a third ground for relief, contends that the disunity in the federal system on the question presented creates unfairness. As previously stated, there is no disunity among the federal circuit courts. Hence, Michelin's claim is unsound.

In sum, the only real question posed by Michelin in its petition turns on the particular facts of this case and is of interest solely to the parties involved. In essence, Michelin asks this Court to make a third review of the post-verdict hearing record to see if it can find what two other federal courts have been unable to find – proof of juror partiality. This Court has held that such fact canvassing is not appropriate under a grant of certiorari and that this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnson,* 268 U.S. 220, 227 (1925). Certiorari, therefore, should be denied in the present case based on the above authority.

CONCLUSION

For the above-stated reasons, the Respondents respectfully request that the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully submitted,

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